

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD WHEELER,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 267445

Wayne Circuit Court

LC No. 05-007220-01

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Defendant Ronald Wheeler appeals as of right his jury trial convictions of four counts of felonious assault¹ and possession of a firearm during the commission of a felony (felony-firearm).² The trial court sentenced Wheeler to two years' probation for the felonious assault convictions and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

This case arises out of a burglary near an auto repair shop where Wheeler worked. Jill Siarto and Michael Young were owners of an electrical supply warehouse in Detroit. In the early morning hours of June 19, 2005, Siarto and Young received calls from their security company informing them of an apparent burglary at the warehouse. By the time Siarto and Young arrived at the warehouse, four police officers were already on the scene. Two of the officers, Michael Sova and Reginald Dyas, noted that they had been dispatched to the warehouse to investigate a "B and E" involving a white van that had been loading goods from the warehouse. After their arrival, Siarto and Young inspected the premises with police and found a spool of copper wire in the vacant field behind the warehouse.

As Siarto, Young, and the officers were walking back into the warehouse, a shot was fired. Siarto claimed that she could hear the gunshot "go right past us." Two of the officers also claimed that they heard bullets go past them. Siarto and Young ran into the warehouse. The

¹ MCL 750.82.

² MCL 750.227b.

officers took cover near the warehouse, and saw Wheeler approaching them from the “tow yard” adjacent to the vacant field. Alongside Wheeler was a white van. Wheeler fired two shots and shouted “get the [expletive] off my property.” One of the officers claimed that Wheeler was pointing the gun toward the officers when he fired, and two other officers claimed they saw a muzzle flash come from the middle of Wheeler’s chest – an indication that he was holding the gun in front of his chest when he opened fire.

The officers then identified themselves as police and returned fire. Wheeler dropped to the ground, and the police approached and handcuffed him. A revolver was found a few feet from Wheeler. The van, meanwhile, turned around and drove toward a building next to the tow yard. Two individuals got out of the van and went into the building. Police entered this building where they found and arrested Keith Cromer and Joseph Bobee. No bullet strike marks were found on the warehouse behind where the officers were standing during the shooting.

Wheeler, Cromer, and Bobee, not surprisingly, presented an entirely different rendition of events. According to them, in the early morning hours of June 19, 2005, Wheeler and Cromer were fixing a car at Wheeler’s father’s repair shop, Pace Towing. In addition to being an auto repair shop, Pace Towing impounded cars for the city of Detroit and stored them in the tow yard area behind the repair shop. Bobee was the security guard at Pace Towing. Between 2:00 a.m. and 3:00 a.m., Wheeler accompanied Cromer to a gas station. At the gas station, police officers approached Wheeler and searched Cromer’s white van. After the search, the officers released Wheeler and Cromer and told them that they had searched the van because it “fit the description of a B and E” that had occurred “on the other side of [Wheeler’s] yard.” The officers also told Wheeler that the suspects were armed.

After returning to the repair shop, Wheeler heard noises and thought that someone was attempting a burglary. Wheeler grabbed Bobee’s gun, went outside, fired a shot above his head, and yelled, “Get the [expletive] out of my yard.” Cromer, who was in his van preparing to leave, heard the shot and drove to the tow yard where Wheeler was standing. Wheeler saw that people were moving and fired two more shots into the air “to scare them off.” Cromer claimed that at this point, he saw two sparks go into the air above Wheeler’s head. When the police identified themselves, Wheeler dropped to the ground while Cromer drove back and went inside the repair shop with Bobee, who had been standing outside during these events.

Following his trial, Wheeler filed a motion for a new trial and evidentiary hearing. The trial court denied the motion, and this appeal ensued.

II. Jury Instructions

Wheeler argues that the trial court failed to instruct the jury on the use of nondeadly force in self-defense, nondeadly force to protect property, the threat of deadly force to protect property, and nondeadly force to terminate or prevent the commission of a crime. However, Wheeler waived this issue for appeal by his express approval of the jury instructions.³

³ *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Wheeler also argues that his convictions should be vacated because the trial court erroneously provided an instruction on felonious assault. However, defense counsel expressly approved of the instructions and verdict form—both of which included felonious assault. Therefore, Wheeler has waived this issue as well.

III. Exclusion Of Testimony

A. Standard Of Review

Wheeler argues that the trial court erroneously excluded his father's testimony that he had a possessory interest in the tow yard behind his auto repair shop. We review a trial court's evidentiary ruling for an abuse of discretion, but we review preliminary questions of law pertaining to this issue de novo.⁴

B. Legal Standards

Generally, evidence is admissible if it is relevant but inadmissible if it is not.⁵ Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.⁶ “Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point.”⁷

C. Applying The Standards

We conclude that whether Wheeler's father had a possessory interest in land has no bearing on any material point. Indeed, contrary to Wheeler's argument, any interest his father may have had in the land does not aid in the determination of whether Wheeler could lawfully use force to protect himself or his property given the facts of this case. The existence of any property interest in land throws no light on Wheeler's intent at the time he fired the three shots. Therefore, the trial court did not abuse its discretion in excluding this evidence as irrelevant.

D. Corroboration

Wheeler also argues that the trial court erroneously excluded his father's testimony because it would have corroborated the testimony of the other defense witnesses. We review this unpreserved issue for plain error affecting substantial rights.⁸ In support of his argument, Wheeler attaches his father's affidavit to his brief on appeal. However, Wheeler failed to make this offer of proof at trial in order for the trial court to rule on the admissibility of this testimony

⁴ *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

⁵ MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 562 (2002).

⁶ MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002).

⁷ *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

⁸ *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003), citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

as required by MRE 103(a)(2). Therefore, this Court is unable to conclude whether the exclusion of this testimony violated Wheeler's substantial rights.⁹ Further, it is impermissible for a party to expand the record on appeal.¹⁰

E. Confrontation

Wheeler also claims that because the trial court did not allow his father to testify, he was denied his right to confrontation and to present a defense. However, Wheeler has not made any arguments or cited any authority to support this assertion. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."¹¹ Thus, Wheeler has abandoned this issue. In any event, there is no showing that Wheeler was unable to confront the evidence presented against him or present a defense.

IV. Prosecutorial Misconduct

A. Standard Of Review

Wheeler argues that he was denied a fair trial due to prosecutorial misconduct. We review unpreserved issues of prosecutorial misconduct for plain error affecting substantial rights.¹² If a curative instruction could have alleviated any prejudicial effect, there is no error requiring reversal.¹³

B. Legal Standards

Prosecutorial misconduct occurs if a defendant is denied a fair trial.¹⁴ In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context, on a case-by-case basis.¹⁵

⁹ See *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999) (a defendant must make an offer of proof regarding the substance of a witness's excluded testimony in order for this Court to conclude whether the exclusion violated defendant's substantial rights).

¹⁰ *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

¹¹ *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

¹² *Aldrich*, *supra* at 110, citing *Carines*, *supra* at 763.

¹³ *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

¹⁴ *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

¹⁵ *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

C. Applying The Standards

Wheeler first claims that the prosecutor misled the jury during voir dire, his opening statement, and closing and rebuttal arguments by urging a conviction based on his personal opinion about the facts and the authority of the prosecutor's office.

It is improper for a prosecutor to use the prestige of his office to suggest that he has special knowledge of defendant's guilt.¹⁶ Here, however, we conclude that none of the prosecutor's comments invoked the prestige of the prosecutor's office to suggest that the evidence the prosecution would present "must be true and, by logical inference, that the prosecutor has special knowledge of the veracity of witnesses."¹⁷ Rather, during voir dire, the prosecutor merely informed the jury that his role in this trial was to present facts from which it could be inferred that Wheeler was guilty as charged. Thus, the prosecutor's comments during voir dire were not improper.

During the prosecutor's opening statement, the prosecutor did accuse Wheeler of "vigilantism." However, a prosecutor is permitted to use emotional language and need not phrase his argument "in the blandest of all possible terms."¹⁸ During closing argument, the prosecutor argued the issue of Wheeler's intent. However, it is proper for a prosecutor to respond to defendant's theory of the case.¹⁹ Indeed, defense counsel had noted at the beginning of trial his theories that Wheeler acted in self-defense and defense of property. Thus, in context, it is clear that the prosecutor was properly addressing these affirmative defenses. Similarly, given that a prosecutor may argue the evidence as well as all reasonable inferences arising from it as they relate to the case,²⁰ it was appropriate for the prosecutor to argue the issue of Wheeler's intent in light of his own testimony that he fired shots in order to scare people.

During the prosecutor's rebuttal argument, the prosecutor argued that Wheeler had no right to "take the law into his own hands," and again accused him of "vigilantism." However, these "comments must be considered in light of defense arguments."²¹ Here, defense counsel insinuated during closing argument that Wheeler's response to police was based on his belief that there were burglars on his land. Thus, in context, the prosecutor was responding to defense counsel's argument.

Wheeler next claims that the prosecutor denigrated the validity of the defenses that he attempted to raise on his own behalf. However, the trial court denied Wheeler's request for instructions on any of his affirmative defense theories. Thus, even if the prosecutor's comments

¹⁶ *People v Matuszak*, 263 Mich App 42, 54; 687 NW2d 342 (2004).

¹⁷ *Id.*

¹⁸ *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

¹⁹ *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

²⁰ *Bahoda*, *supra* at 282.

²¹ *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

could be considered as denigrating, the prosecutor can hardly be faulted for remarks that would undermine defenses to which Wheeler was not entitled. Wheeler also argues that it was inappropriate for the prosecutor to tell the jury that “[s]hooting at people is never okay.” However, this statement was applicable to the circumstances of this case when it is viewed in the context of the testimony both of Wheeler and the police officers.

Wheeler next argues that the prosecution improperly asked him to comment on the credibility of the police officers that testified at trial. “A prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses because a defendant’s opinion of their credibility is not probative.”²² Here, the prosecutor asked Wheeler if the police officers lied in their reports. Because this line of questioning related to the credibility of the prosecutor’s witnesses, it was, at least arguably, improper. Regardless, the trial court provided a curative instruction to the jury that it was the judge of witness credibility. Therefore, this questioning did not result in unfair prejudice to Wheeler.

Wheeler next argues that the prosecutor’s argument regarding the credibility of the defense witnesses was made in bad faith and amounted to prosecutorial misconduct. Specifically, Wheeler cites the following statement as improper:

Mr. Wheeler finds himself working at his business, if you believe that he was indeed working at his business at that hour of the morning, working at his business at 5:00 in the morning, 4:00 in the morning, what have you.

* * *

While, Mr. Wheeler does have a reason to lie. He’s the one on trial. He’s the one that’s trying to minimize what he did. See, he’s been caught.

A prosecutor may argue from the evidence that a witness is not worthy of belief.²³ Here, to support his argument the prosecutor pointed to Wheeler’s own testimony that he was working at an odd time in the morning and noted that Wheeler had a motivation to fabricate his testimony. In this context, the prosecutor was presenting the jury with reasonable inferences that could be made from the evidence regarding Wheeler’s credibility. Wheeler claims this argument was made in bad faith because, even though his father could have corroborated the defense witnesses, the prosecutor claimed his testimony would be irrelevant. Given that Wheeler only proffered his father’s testimony as to his possessory interest in land, this argument is without merit. Thus, it can hardly be said the prosecutor acted in bad faith under these circumstances.

Notwithstanding any of the foregoing, even if any of the prosecutor’s comments were improper, Wheeler has failed to show outcome determinative error. Indeed, Wheeler admitted firing three shots in the air in order to scare people and was not truly innocent. Moreover, the trial court instructed the jury that the attorneys’ arguments and questions were not evidence.

²² *Ackerman, supra* at 449.

²³ *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Given that juries are presumed to follow their instructions,²⁴ these instructions eliminated any potential for prejudice from the prosecution's remarks.²⁵ Therefore, we conclude that the prosecutor's remarks did not violate Wheeler's substantial rights.

V. Ineffective Assistance Of Counsel

A. Standard Of Review

Wheeler argues that defense counsel's failure to request special instructions or object to the prosecutor's comments constituted ineffective assistance of counsel. Because the trial court denied Wheeler's motion for a *Ginther* hearing, this Court limits its review to mistakes apparent on the existing record.²⁶

B. Legal Standards

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel.²⁷ "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different."²⁸

C. Applying The Standards

We conclude that Wheeler was not entitled to an instruction on any of the affirmative defenses he asserted. Wheeler failed to present any evidence supporting a self-defense instruction, and was therefore, not entitled to this instruction.²⁹ Further, notwithstanding Wheeler's failure to request instructions on the use of nondeadly force to protect property, the threat of deadly force to protect property, and nondeadly force to terminate or prevent the commission of a crime, he has failed to show that he was entitled to any of these instructions. Indeed, not only has this Court found that one may only use reasonable force to protect one's property³⁰ but also Wheeler's use of a firearm can hardly be considered nondeadly force. Thus, Wheeler's instructional claim fails.

²⁴ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

²⁵ *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 95 (2002).

²⁶ *Id.* at 38.

²⁷ US Const, Am VI; Const 1963, art 1, § 20.

²⁸ *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

²⁹ See *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998) ("A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense.").

³⁰ *Bryant v Brannen*, 180 Mich App 87, 103; 446 NW2d 847 (1989), citing *People v Doud*, 223 Mich 120; 193 NW 884 (1923).

Further, as noted above, none of the prosecutor's comments denied him a fair trial. Therefore, any request for special instructions or objection to the prosecutor's remarks or questions would have been futile. Given that "[d]efense counsel is not required to make a meritless motion or a futile objection,"³¹ the failure to request a special instruction or object to the prosecutor's comments was neither objectively unreasonable nor outcome determinative. Therefore, Wheeler's ineffective assistance of counsel claim fails.

VI. Cumulative Error

A. Standard Of Review

Wheeler argues that the cumulative effect of the errors in this case constituted a miscarriage of justice and denied him a fair trial. "This Court reviews a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial."³²

B. Legal Standards

In order for a claim of cumulative-error to warrant reversal, the errors must be of consequence.³³ In other words, the cumulative effect of the errors must be so prejudicial that it denied defendant a fair trial.³⁴ In some cases, the cumulation of minor errors may amount to error requiring reversal, even if individual errors, alone, would not.³⁵ Nevertheless, "only actual errors are aggregated to determine their cumulative effect."³⁶

C. Applying The Standards

We conclude that Wheeler has failed to show any reviewable actual errors. Therefore, "a cumulative effect of errors is incapable of being found."³⁷

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

³¹ *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

³² *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003).

³³ *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

³⁴ *Ackerman*, *supra* at 454.

³⁵ *Hill*, *supra* at 152.

³⁶ *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999), quoting *Bahoda*, *supra* at 292 n 64.

³⁷ *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).